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No. 82-1645

In the Supreme Court of the United States

OCTOBER TERM, 1982

JULIUS GOLDMAN'S EGG CITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in dismissing its claim for additional indemnification for the fair market value of its destroyed poultry flock under 21 U.S.C. (1970 ed.) 114-114a, 134-134h, and 9 C.F.R. 53.3 (1975).

1. Petitioner's poultry were ordered destroyed by the Secretary of Agriculture for the purpose of controlling an exotic poultry disease, Velogenic Viscerotropic Newcastle disease (Pet. App. 1a-2a). The disease first appeared in commercial poultry flocks in southern California in November 1971. When the disease threatened to spread throughout the country, the Secretary exercised his statutory authority to declare a national emergency and, with the cooperation of California health authorities, instituted a

program to quarantine and destroy the infected flocks and pay the owners the fair market value of their destroyed flocks (Pet. App. 2a, 14a).

The flocks in approximately 160 ranches in eight affected counties were appraised and destroyed, compensation was paid to the owners, and the ranches were cleaned and disinfected. A task force of 1,500 persons, including veterinarians and agricultural economists, carried out the operation. The initial indemnity paid to all the owners was $17.7 million; this sum was later supplemented by a payment of $5.6 million, for a total of more than $23 million (Pet. App. 2a-3a, 14a).

On September 7, 1972, the Secretary determined that petitioner's flock had been exposed to the disease. Petitioner's egg ranch in Ventura County, California, the largest in the world, housed some 3.4 million (or 31%) of the 11 million chickens that were destroyed (Pet. App. 3a, 14a). The destruction of petitioner's flock and the cleaning and disinfecting of its facilities were completed on December 26, 1972, and petitioner was permitted to begin bringing replacement chickens back into its premises on February 1, 1973 (*id.* at 3a). Petitioner was paid approximately $5.2 million as an initial indemnity and $2 million as a supplemental indemnity, a total of some $7.2 million, or 31% of the more than $23 million paid out under the program (*id.* at 3a, 14a).

In October 1975, petitioner filed a petition in the United States Court of Claims for additional payments of indemnities (Pet. App. 3a, 14a-15a). After a trial on the merits, the lower court dismissed the petition (*id.* at 15a), holding that petitioner had not met its burden of showing that it was inadequately compensated for the fair market value of its flock (*id.* at 17a) and that the initial and supplemental indemnities, taken together, were the product of a rational,

bona fide effort by the Secretary to fix the fair market value of the destroyed birds (*id.* at 17a-18a). The court of appeals affirmed (*id.* at 1a-12a; 697 F.2d 1051).

2. Petitioner concedes that the standards adopted by the Secretary pursuant to 21 U.S.C. (1970 ed.) 114-114a, 134-134h, and 9 C.F.R. 53.3 (1975), "were reasonable on their face" (Pet. 4). Thus, petitioner's sole challenge is to the application of those standards to the particular facts presented in this case. There is no occasion for this Court to decide an issue of such limited significance. In any event, the decision of the court of appeals is plainly correct.

a. Petitioner first argues (Pet. 5-10) that the Secretary disregarded his announced standards in carrying out the indemnification program. In essence, petitioner contends that the formulas established by the Secretary for determining the fair market value of the destroyed flocks — while generally reasonable — were inappropriate when applied to petitioner. But petitioner received an appropriate pro rata share of the indemnification program (31% of the total payment as compensation for 31% of the number of destroyed chickens) — a clear indication that the Secretary acted in a fair and even-handed manner.

The statute provides that the Secretary "shall" compensate the owners of diseased animals destroyed pursuant to the section and that "[s]uch compensation shall be based upon the fair market value as determined by the Secretary, of any such animal * * * at the time of the destruction thereof." 21 U.S.C. (1970 ed.) 134a(d). The fair market value of chickens therefore "shall be determined by the * * * egg production * * * value of such animals." 9 C.F.R. 53.3(b) (1975). In assessing the fair market value of chickens, the Secretary found that there was no actual market for chickens of various ages but only for day-old chicks or 20-week old pullets. In light of this fact, the

Secretary, by adding the $1.65 market price for a 20-week old pullet to the 35-cent estimated average cost of raising the pullet to 26 weeks, concluded that $2.00 was a fair market value for an average prime-age 26-week old chicken, the age when an egg-laying chicken becomes profitable (Pet. App. 6a-7a). While $2.00 was the maximum allowable payment for a chicken of the optimum age, the values were not absolute, but rather served as a guideline for negotiating with the ranchers. Each rancher was paid an indemnity in accordance with an agreement reached on the basis of the guidelines (*id.* at 7a, 16a).

Following the payment of the initial indemnity, egg prices rose and the Secretary concluded that the guidelines for the initial indemnity were thus inadequate to pay the fair market value of the destroyed flocks. Accordingly, each rancher was paid a supplemental indemnity based on a formula that included the rancher's theoretical lost profits from his flock during the 26 weeks following destruction (Pet. App. 7a, 17a).

Petitioner argues that the application of the initial indemnity formula did not provide adequate compensation for the actual cost it incurred in replacing its flock. Specifically, petitioner contends that the formula was obsolete by the time its birds were destroyed and that its costs were higher because it raised birds that were healthier and more productive than those at other ranches.[1] This argument is

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[1]The applicable regulations permitted the appraisal of animals in groups (9 C.F.R. 53.3(b) (1975)). The Secretary determined that egg-laying chickens had the same value per head and, thus, based the initial indemnity guidelines on the value of the average chicken (Pet. App. 7a, 20a). Since the valuation of domestic animals such as chickens is a matter Congress has delegated to the Secretary in light of the Secretary's expertise, see *Nabisco, Inc.* v. *United States*, 599 F.2d 415, 422 (Ct. Cl. 1979), and since there was no evidence that the Secretary was wrong, the court of appeals correctly held that such a valuation was not unreasonable (Pet. App. 7a). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

without merit. Replacement cost is not synonymous with replacement value, and the cost to a single entrepeneur is not the equivalent of fair market value. *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 406 (1949). Furthermore, the court of appeals affirmed the trial court's finding that petitioner had failed to show that its flock had a fair market value greater than the amount that was paid to it; there were no objective data in the record that supported petitioner's claim that its chickens were more valuable or more productive than average chickens (Pet. App. 9a & n.4, 20a).[2] Thus, the Secretary's application of the initial indemnity formula to petitioner was reasonable and appropriate.

Petitioner also argues that the supplemental indemnity was inadequate because it was based on the hypothetical lost profits from egg production in a 26-week period when it took substantially longer than 26 weeks to repopulate petitioner's ranch. This argument fails because, contrary to petitioner's interpretation of the indemnity, the supplemental indemnity was not intended as payment for all lost profits for egg production following the destruction of the ranchers' flock. See Pet. App. 8a. Rather, it was an adjustment or addition to the initial determination of the fair market value to the extent that the earlier payment was perceived as inadequate to compensate for the egg-producing profit element of the fair market value at the time of destruction (see *id.* at 10a). The Secretary's formulation for the supplemental indemnity was fair and reasonable, and his judgment is entitled to deference. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).[3]

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[2]This Court has declined to review factual determinations in which the trial court and the court of appeals have concurred, absent the most exceptional circumstances. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

[3]Because the Secretary did follow the regulations and standards he adopted, the cases cited by petitioner (Pet. 9) are inapposite.

b. Petitioner next contends (Pet. 10-13) that the lower courts improperly substituted their own definition of fair market value for that adopted by the Secretary. In this regard, petitioner simply disagrees with the Secretary's interpretation of the statute and regulations and the lower courts' approval of that interpretation. Moreover, the argument that the courts adopted a definition of fair market value that differed from the Secretary's is rebutted by the face of the opinions. The court of appeals clearly held that the standard of review is not the court's own view of fair market value but the propriety of the Secretary's determination pursuant to his statutory authority (Pet. App. 5a). The court noted that it was guided by the principle that the Secretary's construction of the statute should be followed absent "compelling indications that it is wrong" (*Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 381), and that an agency's interpretation of its own regulations is to be upheld if it has a rational basis, even if it is not the result that the court would have reached in the first instance. *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153 (1946); *Nabisco, Inc.* v. *United States,* 599 F.2d 415, 419 (Ct. Cl. 1979). Pet. App. 5a-6a. This Court recently reaffirmed that this is the correct standard for review of administrative action. *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20. In addition, the court of appeals held (Pet. App. 6a) that "when the Secretary's determination involves the exercise of administrative discretion, the review court must defer to his judgment as to where to draw the lines."

Thus, the lower courts reviewed the Secretary's determination of the fair market value of petitioner's flock by analyzing the purposes and application of both the initial and supplemental indemnities (Pet. App. 6a-10a, 16a-24a).

Since the lower courts found that the Secretary's interpretation of the statute and regulations was reasonable, they deferred to the Secretary's determination and, clearly, did not substitute their own judgments for that of the Secretary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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